IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-1821

UNITED STATES OF AMERICA,
Petitioner,

-VS-

SYLVIA L. MENDENHALL,
Respondent.

BRIEF IN OPPOSITION

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Sylvia Mendenhall, through her counsel, submits that this court should deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the en banc court of appeals (Petitioners App. A, 1a-7a) is not yet reported. The opinion of the Panel (Pet. App. B, 8a) and the opinion of the district court (Pet. App. C, 9a-20a) are not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 6, 1979. The government was granted an extension of time in which to file their Petition for Certiorari until June 5, 1979. Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether an arrest occurred where there is no claim of probable cause by the government and where defendant was seized by federal agents in a room within a private, locked DEA office in an airport for the purpose of obtaining a search of defendant.

(2) Whether the court of appeals properly refused to uphold an investigatory stop where federal agents knew only that defendant 1) was on a flight from Los Angeles to Detroit, 2) was the last passenger to deplane, and 3) upon deplaning the defendant appeared nervous to the federal agent and looked around the area where agents were standing.

(3) Whether a search must fail where the consent is obtained within minutes of an illegal stop and an illegal arrest

and there is no intervening factor of significance to dissipate the taint of the illegal stop and illegal arrest.

STATEMENT OF THE CASE

(1) Sylvia Mendenhall was indicted in the United States District Court for the Eastern District of Michigan for possession of heroin with intent to distribute it in violation of 21 U.S.C. 841(a) (1). Defendant filed a motion to suppress evidence which was denied by the district court. Sylvia Mendenhall was convicted as charged in a non-jury trial on stipulated facts. Sylvia Mendenhall was sentenced on January 20, 1978 to 18 months in prison with a special parole term of three years to follow. Bond was cancelled.

The direct appeal followed reversing the judgment of the district court and suppressing the evidence in an unpublished per curiam opinion. En banc review in this case and *U.S.* v *Camacho*, No. 78-5081 (6th Cir. October 18, 1978) reinstated the panel decision.

Neither the court of appeals panel nor the Sixth Circuit en banc decided defendant's issue as to whether the case should be remanded to the district court to re-open the evidentiary hearing since defendant did not voluntarily relinquish her right to be present at the hearing on the motion to suppress evidence. This is due to the fact that the court of appeals ruled that seizure and search of Sylvia Mendenhall failed to pass constitutional muster. The circumstances of this issue are set forth in point four, *infra*, of this statement of the case.

(2) Although the government does not claim probable cause, the arrest in this case is sought to be justified on the basis of an alleged airport drug courier profile developed by federal agents. Following Supreme Court law the courts of appeals have refused to grant carte blanche permission to search based on the profile's amorphous aggregation of characteristics of individuals. The courts of appeals have insisted that each case be judged on its record. Petitioner

apparently seeks to eliminate the case-by-case approach by setting up a class of cases in which searches will automatically be permissible.[1] The courts of appeals have uniformly rejected this novel approach to stopping citizens and have insisted on an articulable suspicion or probable cause to arrest.

(3) Sylvia Mendenhall was stopped by federal agents at Detroit Metropolitan Airport as she was proceeding down the concourse to board a flight to Pittsburgh. (Tr. 14) The agents had no prior information about the Defendant, nor, apparently, any information suggesting that an incident of drug-trafficking was to occur. (Tr. 25)

At the time of the stop, the agents had seen the defendant "satisfy" three characteristics of the "drug courier profile." She had (1) arrived on a flight from Los Angeles (Tr. 10); (2) been the last person to exit the aircraft (Tr. 11);[2] and, (3) appeared nervous to the agents while glancing around the deplaning area. (Tr. 19)

Two other factors that came to the agents attention evaporated prior to the stop in this case: (1) the significance of claiming no baggage evaporated when the agents discovered that the defendant was in the process of changing airlines and it would be more unusual for a person to transfer their own luggage (Tr. 21-22); (2) the significance of transfer-

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[1] Petitioner relies on cases regarding airport searches to prevent air piracy. Pet. 18, n. 17. Of course, the number of "profiles" could be increased to allow federal agents to search anyone at any time. Recently the Ninth Circuit Court of Appeals has rejected random searches by use of an "alien courier profile." *United States* v. *Cortez*, 595 F.2d 505 (9th Cir. 1979). Likewise, the Fifth Circuit Court of Appeals has held that resemblance to a "smuggling profile" does not determine the constitutional validity of a search since that depends on the facts in each case. *United States* v. *Klein*, 592 F.2d 909 (5th Cir. 1979).

[2] Although the Petitioner asserts that "deplaning last" is a characteristic of the "drug courier profile," Pet. 3, n.2, this factor does not appear in any of the reported cases.

ing airlines[3] evaporated since the agent did not know if any nonstop flights were available from Los Angeles to Pittsburgh nor was he aware of when an American Airlines flight would go to Pittsburgh from Detroit. (Tr. 13) (The defendant had arrived from Los Angeles on an American Airlines flight and was continuing to Pittsburgh on an Eastern Airlines flight.) (Tr. 10, 13)

Following questioning in the concourse, the defendant was asked to accompany the agents to the DEA office. (Tr. 15) She was not told that she was free to leave, and, in fact, would have been stopped had she attempted to walk away. (Tr. 16)

The DEA office located at the airport is private and locked. The defendant was taken to a room within this office. (Tr. 27) DEA agent Thomas Anderson asked the defendant if he could search her person as well as her handbag. The agent testified that he stated to the defendant that she had the right to decline if she so desired and that she responded, "Go ahead." (Tr. 15-16)

Following a search of the defendant's purse, Beverly Mercier, a female police officer, arrived at the DEA office and accompanied the defendant to a separate room. (Tr. 17) Officer Mercier had previously searched a number of women, including approximately ten for narcotics. She had never had a woman refuse consent for the search. (Tr. 36-37) According to Officer Mercier, the defendant was asked if she consented to the search and she replied that she did. Officer Mercier then told the defendant that "It's a strip search. That means everything goes off." (Tr. 34)

At this point the defendant told the officer that she had a plane to catch. Officer Mercier told the defendant that if she

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[3] The "transfer of airlines" characteristic, does not appear to have been relied on by the government in any other "profile" cases. In fact, it appears to conflict with testimony given by DEA agents in other cases that the profile includes taking *direct* flights from specified cities. *See United States* v. *Floyd*, 418 F. Supp. 724, 725 (E.D. Mich. 1976); *United States* v. *Rogers*, 436 F. Supp. 1, 3 (E.D. Mich. 1976).

didn't have anything on her she didn't have a problem. (Tr. 34) Although she kept repeating that she had a plane to catch, the defendant began to undress under the direction of Officer Mercier. (Tr. 34, 37) After the defendant had taken her blouse off, she pulled a package out of her brassiere which was handed to the officer. (Tr. 34) The defendant then took off her skirt, pantyhose, slip and panties. She then handed the officer another package which had been inside her panties. (Tr. 35) The packages were found to contain heroin. (Tr. 17)

If the defendant had attempted to leave the DEA office prior to being searched she would have been stopped. (Tr. 29)

(4) The defendant failed to appear for the evidentiary hearing in this matter. Over objections by her counsel the court proceeded in her absence.

Following the defendant's arrest, defense counsel moved for rehearing so that defendant could present evidence relevant to her arrest and alleged consent to search. This was denied.

The defendant was charged, by Indictment, with bond jumping as a result of her failure to appear at the evidentiary hearing in the instant case. (E.D. Mich. Cr. No. 7-81109) Following a bench trial she was acquitted of this charge.

REASONS IN OPPOSITION

This case presents issues of law well settled in our jurisprudence. Most obviously, the conclusion is clear that a seized person has been placed under arrest when that person has been taken from a public area to a locked, private, federal agent interrogation office for the purpose of obtaining a search of that person. The law as to the point of arrest was recently reaffirmed in *Dunaway* v *New York*, 47 U.S.L.W. 4635 (U.S. June 5, 1979)

The clarity of the arrest issue is dispositive of the entire matter for the government does not claim probable cause to arrest.

It is equally well settled that reasonable suspicion under *Terry* v *Ohio*, 392 U.S. 1 (1968) and its progeny cannot be manufactured from the fact that (1) a person has completed an airplane flight from Los Angeles to Detroit, (2) that a person is the last person to get off the airplane and (3) that the person appears nervous to federal agents while looking about the deplaning area. There are no cases upholding investigatory stops based on facts like this. See, e.g., *United States* v *Ballard*, 573 F.2d 913 (5th Cir. 1978).[4]

Sylvia Mendenhall's consent to a strip search followed within minutes of the illegal stop and arrest. There was no intervening factor of any significance to break the connection between the unconstitutional seizures of her person and the giving of her consent. Rather, the consent was clearly the product of the illegal actions. The decisions in *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Brown* v. *Illinois*, 422 U.S. 590 (1975); and *Dunaway* v. *New York*, 47 U.S.L.W. 4635 (U.S. June 5, 1979) are dispositive of the government's claim that the tainted consent can support the search.

[4] Certainly the officers could have continued their investigation by getting Ms. Mendenhall's ticket history from the airlines, by calling Pittsburgh to observe her upon arrival there or observing her on the flight to Pittsburgh as was done in *United States* v. *Oates*, 560 F.2d 45 (2nd Cir. 1977).

Moreover, even apart from the illegalities that produced the consent, the government failed to meet its burden of establishing that the defendant's consent was freely and voluntarily given under the "totality of the circumstances" test announced in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

The drug courier profile itself is a rather loosely formulated list of characteristics used by Detroit DEA agents to indicate "suspicious persons." All the courts of appeals that have analyzed this courier profile agree that the courier profile is an insufficient basis on which to justify an investigative stop.[5] *United States* v. *Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States* v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States* v. *Rico*, 594 F.2d 320 (2nd Cir. 1979). *See also, United States* v. *Cortez*, 595 F.2d 505 (9th Cir. 1979); *United States* v. *Klein*, 592 F.2d 909 (5th Cir. 1979).

Decisions that Petitioner relies upon for a conflict in law among the courts of appeals are cases where searches have been upheld in factual situations that would also have been legal searches in the Sixth Circuit. *United States* v. *Oates*, 560 F.2d 45 (2nd Cir. 1977), a leading case, is heavily relied upon by Petitioner. In *Oates*, similar to *United States* v. *Lewis*, 556 F.2d 385 (6th Cir. 1977), but unlike *McCaleb* and the present case, Oates' name and face were familiar to detectives as a known narcotics dealer, and, inter alia, there were "highly suspicious" bulges in a companion's clothing. Of course, the searches in both *Oates* and *Lewis* were upheld.

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[5] The prosecution has urged statistical success with the profile. Their figures are very misleading:

1. Absolutely no records were kept as to how many consent searches took place where no contraband was found. (S. App. 3,4)

2. It is impossible to determine how many successful searches resulted from use of the profile alone—an unspecified number of searches involved both the profile and either an informant's tip or some other unspecified type of independent corroboration. (S. App. 20)

("S. App." references are to the supplemental appendix filed with the Supplemental Brief for Appellant for the en banc hearing in this case.)

The Fifth Circuit Court of Appeals has published an opinion on facts similar to those at hand, reaching the same obvious result. In *United States* v. *Ballard*, 573 F.2d 913 (5th Cir. 1978) the court held:

> Because as discussed above, we give little weight to the amount of luggage carried by Ballard, and the suspicion that he arrived from Los Angeles, Ballard's supposed nervousness and his walking pace are the only substantial factors offered to justify the search, and we would be most reluctant to hold that the police can stop anyone exhibiting only those two characteristics. We conclude that Officer Donald did not have reasonable suspicion to stop Ballard and that, therefore, the stop was in violation of the fourth amendment. (573 F.2d at 916)

Petitioner has cited other decisions where the searches at airports have been upheld. In each case cited there was more information articulated by the agent to create a reasonable suspicion than the information present in this case. Literally dozens of stops and searches at Detroit Metropolitan Airport have been upheld by the Sixth Circuit Court of Appeals, but, of course, in each case there was more information articulated by the agent to create a reasonable suspicion than those set forth in this case.[6]

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[6] Reported decisions upholding searches include: *United States* v. *Lewis*, 556 F.2d 385 (6th Cir. 1977), cert. denied 98 S. Ct. 722 (1978); United States v. Canales, 572 F.2d 1182 (6th Cir. 1978); *United States* v. *Pope*, 561 F.2d 663 (6th Cir. 1977); *United States* v. *Smith*, 574 F.2d 882 (6th Cir. 1978); *United States* v. *Gill*, 555 F.2d 597 (6th Cir. 1977); *United States* v. *Andrews*, No. 78-5165 (6th Cir. June 15, 1979). Reported decisions refusing to uphold searches include: *United States* v. *Craemer*, 555 F.2d 594 (6th Cir. 1977); *United States* v. *Hunter*, 550 F.2d 1066 (6th Cir. 1977); *United States* v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977).

1. Whether An Arrest Occurred Where There Is No Claim Of Probable Cause By The Government And Where Defendant Was Seized By Federal Agents In A Room Within A Private, Locked, DEA Office In An Airport For The Purpose Of Obtaining A Search Of Defendant.

Petitioner misreads *United States* v. *McCaleb, supra,* in stating that "asking" a suspect to accompany an agent plus the fact that a suspect is not free to leave at that point constitutes arrest. Petitioner then proceeds to devote his brief to attempting to destroy the strawman he has created.

McCaleb notes that defendants in that case were not free to leave at any point after the initial stop by federal agents, but finds the arrest to be complete when the citizen has been sequestered in a private police office, "when appellants were taken to the private office and were not free to leave, the arrest was clearly complete." 552 F. 2d at 720. The law of arrest is well settled as to the clear circumstances presented here and the holdings in *McCaleb* and the en banc decision in this case reflect that rule of law.

This standard of arrest was most recently affirmed in *Dunaway* v. *New York,* 47 U.S.L.W. 4635 (U.S. June 5, 1979):

> [T]hat detention for custodial interrogatior —regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester Police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized Petitioner and transported him to the police station for interrogation.

In *Dunaway,* like here, the Petitioner was totally restrained. The facts here are indistingushable from a traditional arrest. Defendant was not merely questioned briefly where she was found. Instead she was taken from the public area to the federal agents' private, closed and locked interro-

gation room in the airport. Defendant was never informed she was "free to go," indeed, she would have been physically restrained if she had refused to accompany the officers or had tried to escape their custody. The facts here are indistinguishable from those in *Dunaway*.

Freedom of movement has long been identified as a controlling factor in determining the time of arrest. *Henry* v. *United States*, 361 U.S. 98, at 103 (1959). In *Sibron* v. *New York*, 392 U.S. 40 (1968) the Court held that "looking for narcotics" was not a permissible reason for justifying a *Terry* stop and subsequent search.

Secondly, Petitioner misreads *McCaleb* as basing the finding of arrest on the subjective intent of the federal agents. What the Petitioner fails, or refuses, to perceive is that a reasonable person in the position of Sylvia Mendenhall or the defendant in *McCaleb* could only believe that they were not free to leave. The agents' testimony merely confirms the objective facts and circumstances that would lead any reasonable person in Ms. Mendenhall's position to believe that she was not free to leave. *Dunaway* reaffirms the fact that this area of the law is well-settled.

United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975), describes the permissible intrusion as "modest." Investigative stops usually consumed less than a minute and involved "a brief question or two." *Id.* at 880.

Sylvia Mendenhall's seizure bears no resemblance to the modest, narrowly defined intrusion involved in *Terry* and its progeny. The record and opinion here is in complete conformity with legal precedent compelling a legal as well as common sense conclusion that an arrest has occurred.

2. Whether the Court of Appeals Properly Refused To Uphold an Investigatory Stop Where Federal Agents Knew Only That Defendant (1) Was On A Flight From Los Angeles To Detroit, (2) Was The Last Passenger To Deplane, And (3) Upon Deplaning The Defendant Appeared Nervous To The Federal Agent And Looked Around The Area Where Agents Were Standing.

Petitioner misread *McCaleb* in that his first "question presented" indicated the court of appeals has held that it will never find reasonable suspicion for an investigative stop when observed behaviour could be said to be consistent with innocent behavior. Actually, *McCaleb*, which was reaffirmed in the en banc decision in this case, recognized that each case must be evaluated on its facts in order to determine whether there is any real tie-in with suspected criminal activity:

> While a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion, the circumstances of this case do not provide "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted" the intrusion of an investigatory stop. *Terry* v. *Ohio*, *supra*, 392 U.S. at 21.

United States v. *McCaleb*, 552 F.2d at 720.

Despite Petitioner's claim, consistency with innocent behavior has not been made a "standard."

McCaleb and its progeny correctly implement the recognition in *Terry* that even this type of "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" constitute a "serious intrusion upon the sanctity of the person which may inflict great indignity and arouse strong resentment." 392 U.S. at 20, 17.

In *United States* v. *Canales*, 572 F.2d 1182 (6th Cir. 1978), the *McCaleb* standard was correctly employed to uphold an investigative stop and subsequent conviction. Var-

ious factors of the courier profile were present plus the fact that Canales' car had been seen at the home of a narcotics trafficker, and that Canales had been observed in sections in Mexico near sites of known narcotics trafficking. Although Canales conduct certainly was hypothetically consistent with innocent behavior, the Sixth Circuit found that there was in fact a real tie-in with suspected crime and a reason to stop Canales.

Secondly, Petitioner is mistaken in stating that "the Court seems to regard reliance by the agents on these characteristics in initiating an encounter as largely irrelevant and possibly improper." Pet. 16.

McCaleb correctly recognizes that sets of facts will arise in which the existence of certain profile characteristics constitutes reasonable suspicion. The en banc decision here states: "That the drug enforcement agency employment of this profile in educating as to what conduct to look for in relation to drug couriers is a perfectly valid law enforcement device." Pet. App. 2a. However, the court of appeals has refused to find that the term "courier profile" is a talisman allowing search by judicial fiat.

The decisions below are consistent with *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975) which holds that "in all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling," 422 U.S. at 885, but that "even though the intrusion and incident to a stop is modest, we conclude that it is not 'reasonable' under the Fourth Amendment to make such stops on a random basis." 422 U.S. at 883. The Court recognized the difference between a relevant factor and sufficient information to allow an investigative stop:

> Large numbers of native born and naturalized citizens have the physical characteristics identified with Mexican ancestry; even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien

> is high enough to make Mexican appearance a factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens. 422 U.S. at 887.

Here perhaps the only three remaining factors: (1) being on a flight from Los Angeles to Detroit, (2) being the last person to get off the plane, and (3) glancing about the deplaning area in a manner which is viewed as nervous by the federal agents were relevant in light of the federal agents' experience, but certainly not sufficient to provide reasonable suspicion to stop a citizen.

3. Whether A Search Must Fail Where The Consent Is Obtained Within Minutes Of An Illegal Stop And An Illegal Arrest And There Is No Intervening Factor Of Significance To Dissipate The Taint Of The Illegal Stop And Illegal Arrest.

The consent to search given by the defendant came within minutes of her having been stopped without reasonable suspicion and arrested without probable cause. There was no intervening factor of any significance to dissipate the taint of the illegal stop and arrest.

The government has framed this issue as being: "Whether a suspect who is being illegally detained can validly consent to a search." Pet. 2. It is undisputed that a valid consent *can* follow an illegal arrest—if it was not obtained through exploitation of the illegality. Here, however, the consent was the direct product of the illegal stop and arrest.

In *Brown* v. *Illinois*, 422 U.S. 590 (1975) a confession was obtained following an arrest without probable cause. Finding the relevant inquiry to be "whether Brown's statements were obtained by exploitation of the illegality of his arrest," *id.* at 600, the Court held that there was "no intervening event of significance whatsoever," *id.* at 605, despite the giving of *Miranda* warnings and a lapse of two hours from the illegal arrest before the incriminating state-

ment was made. The same result was recently reached under similar facts in *Dunaway* v. *New York*, 47 U.S.L.W. 4635 (U.S. June 5, 1979). *See also, Wong Sun* v. *United States*, 371 U.S. 471 (1963).

The consent to a strip search given by the defendant here, like the incriminating statements made by defendants in *Brown* v. *Illinois, supra*, and *Dunaway* v. *New York, supra*, was obtained by the exploitation of the illegal arrest. The court of appeals correctly held that the consent was not valid.

The consent relied upon to support the search here was invalid even aside from the illegalities which preceded it. The 22-year-old defendant had been ushered into the private, locked office of the DEA by two federal agents. Although the defendant was told that she did not have to consent to the search she had no reason to believe that she would be released if consent was refused or that the agents would not forcibly search her if she refused consent. The defendant continued to protest that she had a plane to catch even as the strip search commenced. The government clearly failed to establish that the consent was freely and voluntarily given.[7] *See, e.g., Bumper* v. *North Carolina*, 391 U.S. 543 (1968); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

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[7] The inherently coercive nature of the setting in which this "consent" was obtained was underscored by the testimony of the female officer who conducted the search. She testified to having previously searched a number of women, including approximately 10 for narcotics. She had never had a woman refuse consent for the search.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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